# IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

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| **BOBBY MacBRYAN GREEN,** | § | |
| | § | |
| **PLAINTIFF / APPELLANT,** | § | |
| | § | **Appeal No.** |
| **v.** | § | **E2011-02587-COA-R3-CV** |
| | § | |
| **JODI JONES,** | § | |
| **HOWELL SHERROD,** | § | |
| **BETTY ANN POLAHA, and** | § | **Civil Action No. 41049** |
| **MARY LEE JONDAHL,** | § | |
| | § | |
| **DEFENDANTS / APPELLEES.** | § | |

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**ON APPEAL FROM THE JUDGMENT OF**

**THE CHANCERY COURT OF WASHINGTON COUNTY,**

**AT JONESBOROUGH, TENNESSEE**

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# APPLICATION FOR PERMISSION TO APPEAL


Bobby MacBryan Green
Applicant/Appellant/Plaintiff
404 Holly Street
Johnson City, TN 37604-7312
423.747.7206

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# CERTIFICATE OF SERVICE

I am the applicant/appellant/plaintiff in this matter. I hereby certify that on this day I served a true and accurate copy of the attached APPLICATION FOR PERMISSION TO APPEAL upon the attorney for the defendants :

Howell Sherrod, Jr.
SHERROD, GOLDSTEIN & LEE
249 East Main Street
Johnson City, TN 37604

by placing the same in an official depository of the U.S. Postal Service, first class, postage prepaid,

on this the _6__th day of September 2012.

_____
Bobby MacBryan Green
Applicant/Appellant/Plaintiff pro se
404 Holly Street
Johnson City, TN 37604-7312
423.747.7206

# TABLE OF AUTHORITIES

**TENNESSEE SUPREME COURT**



**TENNESSEE COURT OF APPEALS**



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# APPLICATION FOR PERMISSION TO APPEAL

1. Bobby MacBryan Green, applicant/appellant/plaintiff ("Green") requests permission to appeal to the Tennessee Supreme Court the *Judgment* and *Opinion* entered by the Court of Appeals, Eastern Division, on 10 July 2012. No petition for rehearing was filed. In support of this request, Green respectfully asks the Court to consider the following:

## QUESTIONS PRESENTED

A. Do precedent and law require reversal of the Court of Appeals' affirmation of the trial court's grant of summary judgment, where none of the requirements of Rule 56, Tennessee Rules of Civil Procedure were met? Does the *Opinion* properly apply the Hannan v. Alltel de novo standard of review?

B. Does precedent require reversal of the Court of Appeals' affirmation of the trial court's grant of a mandatory injunction against Green where no document filed by the defendants requests an injunction, and where there was no effort to comply with the equitable four-factor test universally required prior to grant of a permanent injunction?

C. Does the body of common law established by the preponderance of American authorities require reversal of the Court of Appeals' holding that no contract exists, where pursuant to the association bylaws Green and every defendant have signed a written pledge to support those bylaws? Have Green and each defendant thereby entered into a reciprocal contract requiring good faith and fair dealing in the application of those bylaws?

## INTRODUCTION

2. A cursory procedural overview is incorporated herein as Endnote 1. Pursuant to Rule 11(b)(3), Tennessee Rules of Appellate Procedure, an overview of the facts and issues consistent

with the record is required to coherently correct many of the *Opinion's* mistaken observations. That remedial overview is incorporated herein as Endnote 2.

3. This civil action involves discrete individuals only, and issues such as concerted bad faith, fraud, and breach of contract. No voluntary association has been made a party. Southside Neighborhood Organization ("SNO") and Green have no grievance with one another. In no way does Green question SNO's right to remove him from office or membership, which SNO has not. Nevertheless, the trial court precipitately declared Jones to be president and enjoined Green to deliver property to Jones.

**AFFIRMATION OF SUMMARY JUDGMENT ABSENT EVERY REQUIREMENT**

4. With this case, the Court of Appeals, Eastern Division, has created a line of precedent upholding the precipitate grant of summary judgment in the absence of any statement of material facts. That court's divergence began with Chambers v. First Volunteer Bank of Tennessee, No. E2011-00020-COA-R3-CV.

5. The *Opinion* in this matter upholds a grant of summary judgment where ***none*** of the requirements of Rule 56, Tenn.R.Civ.P. were met. The trial court's *Final Decree* was entered only two weeks after the filing of defendants' motion to dismiss, which incorporated conclusory affidavits. Summary judgment may not be entered prior to 30 days after the filing of the relevant motion; Rule 56.04, T.R.Civ.P. The *Opinion* acknowledges that Green was "not given the opportunity to offer additional proof by affidavits or other discovery materials to show that there was a genuine issue for trial." *Opinion*, page 6. "'No statement of material facts' exists." *Opinion*, page 5. Assigning the Hannan v. Altel summary judgment standard and purporting to "review the dismissal of the case 'using the standards applicable to summary judgment,'" the Court of Appeals affirmed, relying upon King v. Betts, 354 S.W.3d 691 (Tenn. 2011). In King, two years

of discovery had been completed, a properly supported motion for summary judgment had long been filed, and presumably the record of the relevant hearing was sufficient to meet the standard set by Jennings v. Sewell Allen Piggly Wiggly [3], 173 S.W.3d 710, 713 (Tenn. 2005).

6. Without exception, this Court's relevant decisions, with which the *Opinion* conflicts, have endeavored to prevent the errors and/or abuses found in this matter. The holding below conflicts with Eskin v. Bartee [4], 262 S.W.3d 727, 2008 Tenn. Lexis 535 @ 10, Staples v. CBL & Assoc.[5], 15 S.W.3d 83, 89, 2000 Tenn. LEXIS 132, French v. Stratford House et al.[6], 333 S.W.3d 546, 553, 2011 Tenn. Lexis 9, and Hannan v Alltel [7], 270 S.W.3d 1, 8-9, 2008 Tenn. Lexis 792.

7. The *Opinion* conflicts with the cardinal decision on this subject by the United States Supreme Court, Celotex Corp. v. Catrett [8], 477 U.S. 317, 323; 106 S. Ct. 2548, 2553 (1986); (concurrence by White, J. analyzed in Morris v. Parke, Davis & Company [9], 667 F. Supp. 1332, 1343-4). Rule 56 has been applied by the Third and Fifth Circuit US Courts of Appeals in cases procedurally almost identical to this matter. See Crown Central Petroleum v. Waldman [10], 634 F.2d 127, 129; 1980 U.S. App. Lexis 12204 ; and especially Hanson v. Polk County Land, Inc.[11], 608 F.2d 129, 131; 1979 U.S. App. Lexis 9839.

8. Moreover, the Opinion assigns the Hannan de novo standard of review to the summary judgment question, but fails to properly apply that standard. Mere assertions of the defendants are taken as true and attestations by Green are discarded. The *Opinion* appears to instill and/or manifest insurmountable bias by repeatedly equating defendants Jones, Jondahl, and Polaha with "the Board." The genuine board consists of twelve members. These defendants collectively constitute less than one-half of a quorum of the board.

**WAS GREEN ENJOINED WITHOUT AUTHORITY?**

6. The Court of Appeals has affirmed the trial court's grant of a permanent injunction where no pleading, motion, notice, or affidavit filed by the defendants either requests an injunction or mentions the property involved with the injunction. The record demonstrates no effort to comply with the equitable four-factor test required of every permanent injunction. The United States Supreme Court reversed the US Court of Appeals on this very issue in a recent patent matter.

> HN1 According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable [***646] injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. See, e.g., Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-313, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982); Amoco Production Co. v. Gambell, 480 U.S. 531, 542, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987).

Ebay Inc. v. MercExchange, LLC., 547 U.S. 388, 391; 126 S. Ct.1837, 1839; 2006 U.S. Lexis 3872. The four factor test was applied in Metro Gov't of Nashville v. BellSouth Telcomms. Inc., 502 F.Supp.2d 747,759 (M.D. Tenn. 2007), with Metro's assertions failing the test.

**DO THE BYLAWS AND SIGNED PLEDGES CONSTITUTE CONTRACTS?**

7. Contrary to the preponderance of American authorities, the *Opinion* holds that SNO members are not contractually bound by the bylaws. American Jurisprudence, Second Edition © 2012 West Group states:

> The constitution and bylaws of an unincorporated association constitute a contract between the association and its members, and are binding only on members who are shown to have assented to them. However, one who becomes a member of an association is deemed to have known and assented to its bylaws, and cannot be heard to object to the enforcement thereof.
>
> 6 Am Jur 2d Associations and Clubs § 4.

> [I]t is generally held that the constitution and bylaws of an association constitute the contract between the members and the association and govern and limit the rights and liabilities of both members and association.
>
> It has been held that the articles and bylaws of an association create a **contractual relationship between the members themselves,** although there is also authority [California] holding that whether the bylaws of a voluntary association frame an enforceable contract between the members depends upon the intention of the parties.

(emphasis added) 6 Am Jur 2d Associations and Clubs § 20. In Wilson v. Miller [12], 194 Tenn. 390, 396-7 (1952) this Court came close to concurring with other American authorities that "the constitution and bylaws of a voluntary association ..... become a part of a contract entered into by a member when he joins that association." In Barthell v. Zachman [13], 36 S.W.2d 886, 162 Tenn. 336, 342 (Tenn. 1930) this Court held that a society must "observe its laws and apply them in good faith." Relief was assured to an aggrieved member "upon proper showing of oppression or fraud or excess of jurisdiction."

8. The decision below finds no merit in Green's insistence that SNO membership is allowed under the bylaws only upon the signing of a written pledge to *support* (not merely abide) those bylaws, thereby creating a reciprocal obligation between Green and each defendant and a mutual obligation amongst all. Green took office trusting in those pledges.

9. The National Association of Parliamentarians has communicated with Green regarding this matter, and Green would further brief this issue if permission to appeal is granted.

## CONCLUSION

10. Because summary judgment has been affirmed absent every Rule 56 requirement, and/or because an unsupported permanent injunction has been affirmed, and/or because of the holding below that neither the bylaws nor signed pledges constitute a contract, Green respectfully urges this Court to grant him permission to appeal.

11. This Court has the ability to largely decide this case based upon the current record. The Court of Appeals held that the board meeting was called pursuant to a bylaws provision authorizing any member to call a special meeting. The same paragraph of the bylaws mandates notice of "at least ten days," and the defendants have admitted that only four days notice was given.

* * * * *

## ENDNOTES

### ENDNOTE 1 > CURSORY PROCEDURAL SUMMARY

A. This civil action was initiated (probably prematurely) on 23 June 2011 by the filing of Green's sworn complaint and sworn motion for a restraining order. In support of subsequent sworn motions for temporary injunction and supplemental complaints, Green attested that no action has been taken against him by SNO and that he remains the duly elected president of SNO. He alleged that to his detriment the defendants, acting in concert with ill will, have fraudulently invoked the authority of SNO's twelve member executive board, wrongfully proclaiming him deposed. Defendants have asserted that Green's definite term of office was properly truncated for incapacitation regardless of procedure and that Green's membership was properly revoked without notice. The defendants counterclaimed for damages, up to $50,000 each, citing Green's political efforts within the association.

B. Defendants filed a motion to dismiss with affidavits, which were considered by the trial court. No discovery had been taken. No witnesses were sworn and no stipulations recorded.

Omitting mention of the counterclaim, the trial court's *Final Decree*, entered the same day, declared Jones president and enjoined Green. Subsequently, Green's Rule 59 motion was entertained and denied. The Court of Appeals reviewed, assigning the Hannan v. Altel summary judgment standard, affirming the trial court's *Final Decree,* and remanding sua sponte the counterclaim for discovery and trial.

**ENDNOTE 2 > CURSORY OVERVIEW OF FACTS AND ISSUES**

A. Against the outspoken wishes of the old guard, SNO overwhelmingly elected Green as its president for a definite term of two years pursuant to bylaw. Having been adopted in the bylaws as the governing authority, Roberts Rules are an integral component of those bylaws. Representing the old guard faction, the VP Jodi Jones called a special meeting of the executive board (which Green naively failed to reorganize after his election) on four days notice while Green was known to be briefly out of state. Three board members were never notified of the call. Five out of twelve board members attended that gathering, and proclaimed the VP president. Upon Green's return, he protested the bad faith, fraud, and breach of contract. The trial court precipitately declared the VP president and enjoined Green. Soon afterward, with neither notice nor hearing, Polaha mailed to Green a letter purporting to strip him of his membership also.

B. In essence, the *Opinion* holds that "the Board" (a term which the *Opinion* throughout equates with Jones/Polaha/Jondahl rather than with the twelve member SNO board) held a *vote*, the effect of which was immediate, and nothing else matters. The *Opinion* states that there was no need to look to Roberts Rules.

C. The *Opinion* holds that the bylaws create no contractual relationship and that the controlling consideration is a statement in the bylaws that:

The Executive Board shall have the authority and the responsibility

> to discharge by a three-fourth (3/4) vote any officer or committee chair who becomes incapacitated or otherwise fails to carry out the responsibilities of the office.

The record contains evidence that Jones fraudulently proclaimed Green incapacitated, and that the power of discharge is not a broad-spectrum power.

D. For the purpose of demonstrating that this matter is of sufficient importance to merit the attention of this Court, Green asks the Court to take judicial notice of these facts readily discernable from public records and not reasonably subject to dispute:

> Southside Neighborhood encompasses the Tree Streets National Historic Register District, the largest of its kind in Tennessee. The real property interests within the neighborhood are assessed for tax purposes at $157,707,600 and provide home to thousands of citizens as well as workplace for hundreds more. Southside Neighborhood extends from the 350 acre main campus of East Tennessee State University, to downtown Johnson City, to the National Forest Boundary.[14]

## ENDNOTES 3 THROUGH 14

3. The beneficiary of a grant of summary judgment must ensure an adequate record of the relevant proceeding:

> In [*713] summary, the record is silent as to the basis of both Sewell-Allen's motion and the trial court's order granting the motion for summary judgment.
>
> HN7 An appellant is responsible for preparing the record and providing to the appellate court a "fair, accurate and complete account" of what transpired at the trial level. State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993) (citing State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983)). The appellee, however, shares the responsibility for ensuring the appellate court has a complete record. See Tenn. R. App. P. 24(a), (b), (d) (providing that after the appellant has designated [**8] portions of the record or transcript for appeal, the appellee may designate any other part of the record it deems necessary or may prepare a transcript or a statement of the evidence.)

In Svacha v. Waldens Creek Saddle Club, 60 S.W.3d 851 (Tenn. Ct. App. 2001), the Court of Appeals addressed a summary judgment in which the trial court relied upon the plaintiff's testimony in granting the defendant's motion. The transcript of that testimony was not filed in the trial court or included in the record on appeal. The Court of Appeals vacated the summary judgment, concluding that it could not determine whether the summary judgment was proper because the potentially crucial evidence was not in the record. Id. at 856. The intermediate appellate court acknowledged that the burden is on the appellant to prepare a complete record. Id. The Court of Appeals concluded, however, that **the appellee shares some of the burden to ensure that the record contains all of the proof considered by the trial court, particularly when the trial court grants the appellee's summary judgment motion.** Id. at 855-56 (citing Tenn. R. Civ. P. 56.04; Tenn. R. App. P24(a)). [**9]

We agree with the reasoning in Svacha and conclude that Sewell-Allen has **a responsibility to ensure the appellate record is sufficient to determine if the trial court's summary judgment in its favor was proper. In this case, the record is incomplete, and we are unable to determine the basis for the judgment entered by the trial court.** We refuse to "perform the equivalent of an archeological dig and endeavor to reconstruct the probable basis for the [trial] court's decision." Church v. Perales, 39 S.W.3d 149, 157 (Tenn. Ct. App. 2000) (citation omitted).

Jennings v. Sewell Allen Piggly Wiggly, (bold added) 173 S.W.3d 710, 713 (Tenn. 2005)

4. [**10] Therefore, in each case the appellate court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 88 (Tenn. 2000); Hunter v. Brown, 955 S.W.2d 49, 50-51 (Tenn. 1997). HN3 We consider the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in the non-moving party's favor. Cumulus Broad., Inc. v. Shim, 226 S.W.3d at 373-74; Abbott v. Blount County, 207 S.W.3d 732, 735 (Tenn. 2006).

HN4 When reviewing the evidence, we must first determine whether a factual dispute exists. If a factual dispute exists, we must then ascertain whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. Cumulus Broadcasting, Inc. v. Shim, 226 S.W.3d at 374; McCarley v. W. Quality Food Serv., 960 S.W.2d 585, 588 (Tenn. 1998).

Eskin v. Bartee, 262 S.W.3d 727, 732; 2008 Tenn. Lexis 535 @ 10.

5. ... If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. See McCarley v. West Quality Food Serv., 960 S.W.2d at 588; Robinson v. Omer, 952 S.W.2d at 426.

Staples v. CBL & Assoc., 15 S.W.3d 83, 89; 2000 Tenn. Lexis 132.

6. .. [O]ur task is to review the record to determine whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. Hunter v. Brown, 955 S.W.2d 49, 50-51 (Tenn. 1997); Cowden v. Sovran Bank/Cent. S., 816 S.W.2d 741, 744 (Tenn. 1991). ...

> ... The party seeking the summary judgment has the **ultimate burden** of persuading the court "that there are no disputed, [*554] material facts creating a genuine issue for trial . . . and that he is entitled to judgment as a matter of law." Byrd, 847 S.W.2d at 215. **If** that motion is properly supported, then the burden of production to establish a genuine issue of material fact shifts to the non-moving party. Hannan, 270 S.W.3d at 5. In order to [**15] shift the burden of production, the movant must either affirmatively negate an essential element of the nonmovant's claim or demonstrate that the non-moving party cannot establish an essential element of his claim at trial. Id. at 8-9. The court **must** accept the facts presented by the nonmovant as **true** and resolve any doubts regarding the existence of genuine issue of material fact in the nonmovant's favor. Martin v. Norfolk S. Ry. Co., 271 S.W.3d 76, 84 (Tenn. 2008). At the summary judgment phase, "it is not the role of a trial or appellate court to weigh the evidence or substitute its judgment for that of the trier of fact." Id. at 87 (citing Byrd, 847 S.W.2d at 211).
> ....
>
> One final issue is that of punitive damages. The trial court granted summary judgment to the Defendants on the Administratrix's claim of punitive damages, determining that "the record, taken in the light most favorable to the plaintiff, does not contain" evidence "that the defendants have acted intentionally, recklessly, maliciously, or fraudulently." The Court of Appeals reversed and vacated that part of the trial court's judgment, concluding that the trial court had "prematurely considered the sufficiency of the nonmoving party's evidence [regarding punitive damages] when **the moving party had failed to make any showing that would shift the burden of production** [**51] to the Administratrix." Estate of French, 2009 Tenn. App. LEXIS 33, 2009 WL 211898, at *11 (citing Hannan v. Alltel Publ'g Co., 270 S.W.3d 1, 8-9 (Tenn. 2008)). The Defendants do not take issue with the Court of Appeals' determination that the trial court erred in dismissing the punitive damages claims. We, therefore, affirm the Court of Appeals' resolution of the issue.

French v. Stratford House (bold added) 333 S.W.3d 546, 553; 2011 Tenn. Lexis 9.

7. The main thrust of Hannan need not be reiterated here. The following deserves emphasis in this matter:

> If the moving party makes a properly supported motion, the burden of production then shifts .... **If the moving party does not satisfy its initial burden of production, the court should dismiss the motion for summary judgment.** ...

**"[C]onclusory assertion[s]" are not sufficient** to shift the burden to the non-moving party.

Hannan v Alltel, (quotation marks and brackets in original; bold added) 270 S.W.3d 1, 8-9, 2008 Tenn. Lexis 792, citing Byrd, 847 S.W.2d at 215; and referring to Giggers v. Memphis Housing Authority, 277 S.W.3d 359; 2009 Tenn. Lexis 21; Blanchard v. Kellum, 975 S.W.2d 522, 525 (Tenn. 1998).

8. [**2553] Of course, HN5 a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.

.....

HN 9 .....The court does not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment.

Celotex Corp. v. Catrett, 477 U.S. 317, 323; 106 S. Ct. 2548, 2553 (1986).

But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a **conclusory assertion** that the plaintiff has no evidence to prove his case.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Celotex, (bold added) 477 U.S. at 328, 106 S. Ct. at 2555, 54 U.S.L.W. at 4778-4779 (White, J., concurring in 5-4 decision). Regarding Justice White's concurrence as controlling, see Morris v. Parke, Davis & Company, 667 F. Supp. 1332, 1343-4; 1987 U.S. Dist. Lexis 10620, set out in next endnote.

9. Regarding Justice White's concurrence as controlling:

Most importantly for the purposes of deciding the sub-issue before this Court, the Supreme Court observed that:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the court of the basis of its motion, and identifying those portions of the pleadings, depositions, [**36] answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact.

Celotex, 106 S. Ct. at 2553 (Emphasis added.). This last quotation implies, but does not expressly provide, that the moving party must first depose the nonmoving party's witnesses and obtain production of the said party's evidentiary documents in order to discharge its initial burden of "identifying those portions of the . . . depositions, answers to interrogatories, and admissions on file which . . . demonstrate[] the absence of a genuine issue of material fact." Unfortunately, the majority opinion in Celotex does not clarify the law on this preliminary issue. See: McBride v. Merrell Dow and Pharmaceuticals, Inc., 255 U.S. App. D.C. 183, 800 F.2d 1208, 1213 n.4 (D.C. Cir. 1986) ("There appears to be some question over whether this burden is discharged by a bare allegation that the plaintiff has insufficient evidence to get to the jury, or whether something more, such as citation to relevant depositions or answers to interrogatories is required.").

**Justice White, whose joinder in the Court's opinion in Celotex was necessary [**37] to obtain the five Justice majority**, **wrote** a concurring opinion. Celotex, 106 S. Ct. at 2555 - 2556 (White, J. concurring). Justice White attempted to either clarify or modify the Court's opinion when he wrote in concurrence:

> I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely upon depositions, answers to interrogatories and the like to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute**.** But the movant must discharge the burden the rules place upon him: It is not enough to move for summary judgment without supporting [*1345] the motion in any way or with a conclusionary assertion that the plaintiff has no evidence to prove his case.
>
> A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery rules or by court order. Of course, he must respond if required to do so; but he need not depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only [**38] that he has failed to produce any support for his case. It is defendant's task to negate, if he can, the claimed basis of the suit.
>
> Petitioner Celotex does not dispute that if respondant has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. * * * Because the Court of Appeals found it unnecessary to address this aspect of the case, I agree that the case should be remanded for further proceedings.

Celotex, 106 S. Ct. at 2555 - 2556 (White, B. concurring); See also id. at 2557 - 2559 (**Brennan, J.,** with whom Burger, W., and Blackum, H., join, dissenting) ("Plainly, a

**conclusionary assertion** that the nonmoving party has no evidence **is insufficient** . . . Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. * * * I do not read the Court's opinion to say anything inconsistant [**39] with or different than the preceeding analysis. My disagreement with the Court concerns the application of these principles to the facts of this case.").

**The weight of post-Celotex authority finds Justice White's concurring opinion to be persuasive, if not controlling.** [Extensive references follow in original].

Morris v. Parke, Davis & Co., (bold added) 667 F. Supp. 1332, 1344; 1987 U.S. Dist. Lexis 10620 @34.

10. **[**7]** In Bryson, [HN3] this court recently reiterated the importance of notice in summary judgment proceedings. We stand by our strict adherence to this procedural safeguard. [7] Thus **litigants are entitled to 10 days notice before a Rule 12(b)(6) motion to dismiss may be converted into a Rule 56 motion** for summary judgment. See Hickey v. Arkla Industries, Inc., 615 F.2d 239, 240 (5th Cir. 1980) ("Combined, these Rules (12(b) and 56) establish that, as a rule of thumb, parties are entitled to 10 days notice that a 12(b)(6) motion is being treated as a Rule 56 motion for summary judgment"); Hanson v. Polk County Land, Inc., 608 F.2d 129, 131 (5th Cir. 1980); State of Ohio v. Peterson, Lowry, Rall, Barber & Ross, 585 F.2d 454, 456-57 (10th Cir. 1978).

Crown Central Petroleum v. Waldman, (bold added) 634 F.2d 127, 129; 1980 U.S. App. Lexis 12204.

11. Two procedural difficulties with the grant of summary judgment [**5] in this case require reversal. First, summary judgment was granted on an oral motion, and second, the ten-day notice requirement of Rule 56(c) was not satisfied.
Professors Wright and Miller state that, "as is true of motions generally, [HN2] a Rule 56 motion should be in writing and specify the grounds on which judgment is sought." 10 C. Wright & A. Miller, Federal Practice and Procedure, § 2719 at 455 (1973). The Ninth Circuit, in Sequoia Union High School District, 9 Cir., 1957, 245 F.2d 227, 228, reversed a summary judgment that was based on an oral motion, stating "oral motions for summary judgments in Federal courts are not authorized or provided for in Rule 56 or elsewhere." But see Time, Inc. v. Bernard Geis Associates, S.D.N.Y., 1968, 293 F. Supp. 130, 133. The above rule is sound. Allowing oral motions for summary judgment leads to exactly the confusion that has occurred in this case with each side having different recollections of what was contended. Requiring a written motion also insures adequate notice to both sides. Rule 56(c), Fed.R.Civ.P. Granting defendants' oral motion for summary judgment therefore constituted reversible error.
The second procedural error below [**6] was the court's failure to follow the notice and

hearing requirements set forth in Rule 56(c). That rule provides that [HN3] a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." "This Circuit has upheld the strict requirements of notice embodied in Rule 56," Underwood v. Hunter, 5 Cir., 1979, 604 F.2d 367 and has consistently refused to dispense with the procedural safeguards set forth in the rule. Davis v. Howard, 5 Cir., 1977, 561 F.2d 565; Sharlitt v. Gorinstein, 5 Cir., 1976, 535 F.2d 282; Scott v. Courtesy Inns, Inc., 5 Cir., 1973, 472 F.2d 563; Gutierrez v. El Paso Community Action Program, 5 Cir., 1972, 462 F.2d 121.

The ten-day notice provision of Rule 56 is not an unimportant technicality, but serves substantial interests of litigants before federal courts. As Professors Wright and Miller state:

> The extended time period for service of the motion is especially important in the Rule 56 context because it provides an opportunity for the opposing party to prepare himself as well as he can with regard to whether summary judgment should be entered. In theory, the additional time ought to produce a well-prepared and complete presentation **[**7]** on the motion to facilitate its disposition by the court. In addition, since opposition to a summary judgment motion often is a difficult task, usually involving preparation of both legal and factual arguments as well as affidavits, and since the results of failure are drastic, it is felt that the additional time is needed to assure that the summary judgment process is fair.

10 C. Wright & A. Miller, Federal Practice and Procedure, § 2719 at 451 (1973).

Hanson v. Polk County Land, Inc., 608 F.2d 129, 131; 1979 U.S. App. Lexis 9839;

12. HN1 It is a general rule that where **the constitution and by-laws of a voluntary association** provide a system of tribunals for trial and appeal of internal controversies between members, and require that all members exhaust such procedures before resorting to courts, that such **become a part of a contract entered into by a member when he joins that association.** This is the general rule in [*397] Tennessee. Barthell v. Zachman, 162 Tenn. 336, 36 S. W. (2d) 886. But it is very forcefully argued that such remedies as provided by the constitution need not be exhausted by a member before he may resort to the courts where such an attempt would be futile, illusory or vain as averred in the bill as supplemented and amended.

There are exceptions to the general rule requiring an exhaustion of remedies of the rights provided in the constitution of [**578] the association before resorting to the courts. Among these exceptions it is well said that a member "need not exhaust his remedies within the order and may resort to the courts where it appears that an opportunity to present his claim and have a fair determination of it and to protect [***9] his **substantial rights** are denied by the **bad faith, fraud, malice, or arbitrary or oppressive action of** the association itself or its tribunals or **officers.**" 38 Am. Jur., page 484, Sec. 55. Among the cases cited by the author of this work for the quoted

statement is our case of Barthell v. Zachman, supra. The writer in American Jurisprudence refers to many other exceptions and cites authority for the statements there made.

Wilson v. Miller et al., (bold added) 250 S.W.2d 575,577-8, 194 Tenn. 390, 396-7 (Tenn. 1952).

13. **The society must, of course, observe its laws and apply them in good faith.** It could not use its power oppressively and arbitrarily to the end of depriving a member or members of a property right a beneficial pecuniary right or a **contractual right.** Where the laws of the Order are fraudulently and oppressively used to the [**6] injury of the rights of an aggrieved member, the courts will hear his complaint and, upon proper showing of oppression or fraud **or excess of jurisdiction**, assure him relief. *Murray* v. *Supreme Hive,* 112 Tenn. 664, 679, 80 S.W. 827, C. J., 1116, 19 R. C. L., 1244, et seq.

*(3)* [HN2] Whether a member of the fraternity has been guilty of conduct authorizing an investigation by a duly constituted officer, or trial before a duly constituted tribunal resulting in the imposition of a penalty prescribed by the laws of the Order, is for the association to determine under its constitution and laws. **If, as stated, the tribunal should exceed its jurisdiction and expel members without evidence of guilt or for acts not denounced by laws of the Order, such action would be in excess of jurisdiction** and the members illegally adjudged guilty and deprived either of property or beneficial rights could assert their rights in an action before the courts. *Ryan* v. *Cudahay,* 49 L. R. A., p. 359, note 2.

Barthell v. Zachman, (bold added) 36 S.W.2d 886; 162 Tenn. 336, 342; 1930 Tenn. Lexis 95 @5-6 (Tenn. 1930).

14. This paragraph is based upon the following public records.
To view all sources as hyperlinks see http://southsidedescription.blogspot.com/
(a) "largest of its kind" Johnson City Comprehensive Plan, Historic Preservation Element, pages 36, 41
http://www.johnsoncitytn.org/uploads/files/devservices/planning/compplan/Historic%20Preservation%20Entire%20Document.pdf
(b) "$157,707,600 " – Washington County Deputy Tax Assessor Larry Guinn
https://docs.google.com/folder/d/0B8_fUFZuJrtjT1RHV0Fib3N4OFk/edit
(c) "home to thousands of citizens" "workplace for hundreds"
Johnson City South Side Neighborhood Plan
http://www.johnsoncitytn.org/uploads/files/devservices/planning/Neighborhood%20Plans/South%20Side%20Plan.pdf
(d) "350 acre main campus" - ETSU Facts / Facilities
http://www.etsu.edu/facts/facilities.aspx
(e) "National Forest Boundary" - USDA Forest Service Maps
http://www.fs.usda.gov/recmain/cherokee/recreation
(zoom in on University Parkway US 321 at Cherokee Road TN 67)